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IN THE

Supreme Court of the United States

OCTOBER TERM, 1965

No. 739

GIBRALTOR AMUSEMENTS, LTD.,

Petitioner,

—v.—

THE WURLITZER COMPANY, WURLITZER ACCEPTANCE CORPORATION, WILLIAM F. WADSWORTH and THE NATIONAL BANK OF WESTCHESTER, Petitioning Creditors, Intervening Creditor, and M. HALLSTED CHRIST, Trustee,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents, The Wurlitzer Company (hereinafter "Wurlitzer") and Wurlitzer Acceptance Corporation (hereinafter "WAC"), submit this brief in opposition to the petition of Gibraltor Amusements, Ltd., Bankrupt,[1] acting through its alleged newly elected president, Larry Leon, for a writ of certiorari.

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[1] The petition misspells petitioner's name as "Gibralter."

Question Presented

The question presented in the petition (p. 2) was not raised or considered below and is therefore not one requiring review by this Court.

Statement of the Case

This involuntary bankruptcy proceeding began March 18, 1960 (App. 1a).[2] Adjudication followed on August 19, 1960 after an extended trial which produced 621 pages of testimony and 68 exhibits covering all the issues raised by the bankrupt's answers to the original, amended and intervening petitions in bankruptcy.

Those answers, verified by Sanford J. Moore, the bankrupt's dominating principal and self described "Vice President" and "operating head", contested the claims of the petitioning creditors on every conceivable ground. Not only did they deny any indebtedness to Wurlitzer and WAC but included *inter alia* were affirmative charges of creation of fraudulent obligations and documents, receipt of preferential payments and splitting of claims between Wurlitzer and its subsidiary WAC.[3] In order to sustain the petition, Wurlitzer and WAC not only had to defend against such charges but also proved their claims virtually to the penny.

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[2] References indicated "App." are to appellant's appendix in the Court of Appeals. References to the Trustee's appendix in the Court of Appeals are designated "Tr. App."

[3] These and other portions of the lengthy proceedings herein are printed in the prior papers in this Court and to avoid needless repetition, the Court is respectfully referred to the papers in Docket No. 429, October Term 1961.

Moore, through his then attorney, sought unsuccessfully to overturn the bankrupt's adjudication by review in the District Court (187 F. Supp. 931), by appeal to the Court of Appeals (291 F. 2d 22) and by petition for certiorari in this Court (denied 368 U. S. 925). Meanwhile, in further efforts to delay and impede creditors, Moore concealed and transferred to others substantial portions of the bankrupt's assets. These activities resulted in Federal indictment and prison terms for Moore and his associates (see *United States* v. *Moore, et al.* 290 F. 2d 501, cert. denied 368 U. S. 837). A separate civil action against the conspirators resulted in a partial recovery for the estate (see *M. Hallsted Christ, Trustee, etc.* v. *Vending Enterprises, Inc., et al.,* Civil Action No. 60C-1207, U. S. D. C., E. D. N. Y. [opinion not reported]) sufficient to produce about a 13½% dividend for creditors (App. 35a).

In December 1963, just as proceedings were begun to distribute this dividend, Sanford J. Moore renewed his attempts to overturn the bankruptcy. Using the present petitioner, Larry Leon, an old friend, as newly-elected "President" and new attorneys, Moore charged that the District Court never acquired jurisdiction over the bankrupt and that numerous frauds had been practiced by the petitioning creditors in asserting and proving their claims. After hearings on these charges and a finding, among others, that Leon was but another of Moore's "dummies", Chief Judge Zavatt, Referee Duberstein and Judge Dooling (on review of the Referee) concluded in separate opinions that the Moore-Leon claims were without merit, that the adjudication was proper and that the bankruptcy administration should proceed. The Court of Appeals for the Second Circuit, on January 11, 1965, affirmed the orders, from

the Bench, upon the opinions below (not officially reported) and denied petitions for a rehearing and for a rehearing *en banc*. In May 1965, just prior to the expiration of 90 days, Leon sought an extension of time in which to petition this Court for certiorari. The application for an extension was denied by Mr. Justice Harlan (Tr. App. A-10) and at petitioner's insistence was submitted to Mr. Justice Goldberg and again denied.

While these proceedings were in progress, Leon's attorneys wrote to the Trustee stating objections to the claims filed by various creditors, including Wurlitzer and WAC. After the Court of Appeals affirmed the order upholding the adjudication, the Trustee applied to Referee Duberstein for instructions with respect to the need for prosecution of objections to those claims (App. 32a-36a). The Trustee took the position that, without a showing of probable success in effecting a very substantial reduction, litigation of objections to the claims of Wurlitzer—which amounted to $1,064,837.07—and of WAC—which amounted to $9,036.00—would not be in the best interests of the bankrupt's estate (App. 35a).

Petitioner, in opposition to the Trustee's position, submitted an affidavit of its attorney detailing the grounds of objection to the creditors' claims on the basis of which it urged reconsideration. As the instant petition acknowledges (p. 15), "the bankrupt then exercised its right under the law and sought reconsideration upon its own."

After a hearing, Referee Duberstein found that the claim of WAC "has been determined to be a valid claim throughout the litigation involving the order of adjudication"

(Pet. 37).[4] With respect to Wurlitzer's claim, which constitutes more than 90% of the total claims filed, the Referee noted, *inter alia,* that "protracted litigation with respect thereto would be wasteful of the assets of the estate" and that "[A]ny reduction of less than a major portion of the claim is not likely to result in any significant benefit to other creditors" (Pet. 38). Since on the record already made such a reduction was not even remotely possible, the Referee's order (Pet. 36) directed that the Trustee need not take any steps to object to the claims of the creditors, including Wurlitzer and WAC.

Upon review in the District Court petitioner claimed that the Referee's order was erroneous in many respects but understandably at no time did petitioner raise the question of the bankrupt's status as a party aggrieved or its right to petition for reconsideration of claims presented in this bankruptcy (App. 26a-30a). Instead, petitioner again challenged the validity of the claims in view of the alleged splitting of claims, bonuses earned but not credited, preferential payments received, etc. (App. 27a-29a).

The District Court affirmed the Referee's order in an opinion which considered the merits of petitioner's allegations. No such questions having been raised, the opinion and order did not mention the bankrupt's standing as an aggrieved party or one entitled to petition for reconsideration (Pet. 31-35).

On appeal to the Court of Appeals, petitioner renewed its attack on the validity of the claims. At no time did it raise the question now sought to be presented, although its brief before that court referred to General Order in Bank-

[4] References to the petition are so denominated.

ruptcy 21(6) (pp. 18-19). The Court of Appeals affirmed, from the Bench, the orders appealed from on the decision below (Pet. 31) and thereafter denied a petition for rehearing *en banc* (Pet. 19).

REASONS FOR DENYING THE WRIT

I.

The question presented was not raised or considered by the courts below.

As pointed out above, the order sought to be reviewed was entered on the Trustee's application for instructions with respect to prosecuting objections to the claims of various creditors as urged by petitioner. During the hearing on the Trustee's application in which petitioner participated, on review in the District Court and on appeal to the Court of Appeals, the sole question raised was the necessity of requiring reconsideration of the claims of those creditors on the basis of petitioner's objections. This question was briefed and argued on the merits. At no time was the question of petitioner's standing to seek reconsideration raised or determined by the courts below.

In *Tyrrell* v. *District of Columbia,* 243 U. S. 1 (1917), this Court dismissed a writ of certiorari as improvidently granted because the question posed was not raised in the court below, stating (243 U. S., at p. 4):

> "* * * the question upon which the certiorari was prayed under the circumstances previously stated does not arise on the record and is not open for consideration, and therefore (of course, we assume, through in-

> advertence of counsel) the petition for certiorari was rested upon a wholly unsubstantial and nonexisting ground * * *"

Since the question raised was not before the lower court, it "would not be open for our consideration" (243 U. S., at p. 6).

Similarly, in *Lawn* v. *United States,* 355 U. S. 339, 362 n. 16 (1958), this Court refused to consider questions not raised below, stating:

> "This issue was not raised in the Court of Appeals. Only in exceptional cases will this Court review a question not raised in the Court below. *Duignan* v. *United States,* 274 U. S. 195, 200; *Husty* v. *United States,* 282 U. S. 694, 701, 702. There are no exceptional circumstances here."

Nor do any exceptional circumstances exist in the instant case. Petitioner has in fact presented its ground for objecting to the claims of these creditors on numerous occasions since these proceedings began in 1960. These grounds have been heard and reheard and considered and reconsidered by the courts below and rejected every time. Petitioner has obtained exactly what is sought. Accordingly there is neither a question nor a need calling for this Court to exercise its jurisdiction.

II.

The findings below that petitioner's objections were without merit and further litigation with respect thereto would be wasteful of the assets of the bankrupt's estate raise no problem of importance to the administration of the Bankruptcy Act.

The present petition is the culmination of Sanford J. Moore's third attempt to prevent payment of the claims of creditors—or at least dilute their recovery by the resulting substantial legal expense they and the estate have been saddled with. The Court is urged to review an order of the Referee, affirmed on review in the District Court after a careful examination of the vague and, at best, ambiguous contentions of the petitioner, and upheld on appeal. These contentions, as the District Court opinion makes clear, rest upon the same general charges of fraud, etc., as were litigated twice before and rejected.

The first such rejection occurred on the trial resulting in the original adjudication wherein the Referee declared with respect to Wurlitzer (Tr. App. A-16):

> "Upon the record of the trial and exhibits in evidence, I find:
>
> "A substantial part of the indebtedness of over $1,000,000.00 owed to Wurlitzer by the alleged bankrupt consisted of promissory notes in default which were secured by conditional sales contracts (Tr. 12; Pet. Cr.'s Exs. 14-21, inclusive). The notes and contracts covered several hundred Wurlitzer coin-operated phonographs and other equipment acquired or pur-

chased by the alleged bankrupt in the period of December, 1958 to and including August, 1959, and placed in operation on its juke-box route. These notes and contracts were acquired by Wurlitzer as a holder in due course (Tr. 5) and constituted valid and subsisting liens as against the alleged bankrupt, on the alleged bankrupt's property."

With respect to WAC, the Referee stated (Tr. App. A-17-A-18):

"WAC's claim against the alleged bankrupt arises from the bankrupt's guaranty of two promissory notes which WAC acquired in the regular course of its business by assignment from Wurlitzer (Tr. 52-53, 300-302; Pet. Cr. Exs. 6, 12, 34). The notes in question were executed by Hewlett Vending Co. and Phillip G. Hardy to cover the purchase of Wurlitzer phonographs from the Wurlitzer New York distributor (Pet. Cr. Ex. 12).

• • • • •

"The Hewlett note was acquired by WAC on October 31, 1958 and the Hardy note on May 28, 1959 (Pet. Cr. Ex. 34; Tr. 301), and have remained continuously in its ownership to date (Tr. 302). On the date the petition in bankruptcy herein was filed, March 18, 1960, both notes were in default, $5,261 being due on the Hardy note and $4,785 on the Hewlett note (Tr. 117-118; Pet. Cr. Ex. 35)."

On appeal from the order affirming the adjudication, the Court of Appeals stated with respect to the bankrupt's contentions regarding the invalidity of Wurlitzer's claim (291 F. 2d at p. 24):

> "There is absolutely no merit in most of them. The referee's various factual findings as to Gibraltor's insolvency, Wurlitzer's partially unsecured status and the existence of the Wadsworth debt are amply supported by the record; they surely are not 'clearly erroneous' as they must be to warrant reversal."

And with respect to WAC's claim the court held (*id.*, p. 26):

> "There has been no showing, however, that Wurlitzer has abused the distinct corporate form nor that it has used it fraudulently to subvert the Bankruptcy Act. Lacking such a showing, WAC's claim should be honored."

The second rejection of the contentions urged by petitioner occurred when the Referee dismissed petitioner's December 1963 order to show cause seeking to overturn the adjudication. The District Court upheld the Referee's order stating (Tr. App. A-3-A-4):

> "The Bankrupt's December petition is, in its main bearings, an idle effort to turn its own misconduct into a right to relief by charging as frauds against the petitioning creditors their failure in 1960 to discover what Bankrupt had done."

After a careful analysis of each of the contentions of fraud raised at the time—and raised again in the instant petition —the District Court concluded that they were "so devoid of merit" that the "Referee had no alternative except to grant summarily the relief granted" (Tr. App. A-9).

Undaunted, petitioner tried again by requesting that the Trustee object to the claims, and was again rebuffed. With respect to Wurlitzer the District Court stated (Pet. 34):

> "Against the Wurlitzer claim the soi-disant attorneys for the bankrupt advance the rigmarole about the bankrupt's frauds on Wurlitzer constituting a defense to Wurlitzer's claim and the guaranty farrago, neither of which deserve further mention. See Memorandum and Order, July 27, 1964, pages 1-6, 7-8 [Tr. App. A-1—A-6]."

As to the remainder of the claims, the District Court noted that no specific data was presented by petitioner to even remotely indicate that Wurlitzer's claim could be substantially reduced and then stated (Pet. 34-35):

> "As against that stood the prospect of a protracted contest with little prospect that the ultimate pattern of liquidation and distribution could be much altered by even substantial inroads on Wurlitzer's claim—except that administration expenses would certainly be materially increased and the base of distribution correspondingly reduced."

With respect to WAC, the District Court pointed out that petitioner had failed to make any showing which could even remotely justify reducing the amount of WAC's claim, stating (Pet. 33):

> "Much more would have to be shown to arrive at the conclusion that the bankrupt's account was clear with Acceptance, and no suggestion was made that such a showing was possible."

These holdings raise no important problems in the administration of the Bankruptcy Act because they are neither inconsistent with General Order 21(6) nor subversive of the legislative purpose of the Act. As this Court has said, "the object of bankruptcy laws is the equitable distribution of the debtor's assets amongst his creditors; * * *." *Kuenher* v. *Irving Trust Company,* 299 U. S. 445, 451 (1937). That object will be furthered here by denial of the petition for the writ, which should finally halt the continuing and wasteful attempts to relitigate stale, rejected contentions over and over again.

As was aptly pointed out long ago in *In re Henry Ulfelder Clothing Company,* 98 Fed. 409, 412 (N. D. Calif. 1899):

> "The law certainly does not contemplate that the petitioning creditor shall be required to establish the validity of a particular claim against the bankrupt more than once in the same proceeding unless the court shall, upon some legal ground, grant a new trial of such issue."

Here, no such ground has been shown to exist and the courts below have repeatedly rejected petitioner's contentions as totally lacking in merit.

CONCLUSION

The issues involved in this particular case are of interest only to the immediate litigants. No problem of Federal law deserving the attention of this Court is presented. Accordingly the petition for a writ of certiorari to review the order of the Court of Appeals for the Second Circuit should be denied.

Respectfully submitted,

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December 2, 1965